CODIFICATION AND INNOVATION IN THE QUEENSLAND *HUMAN RIGHTS ACT*: HAVE HUMAN RIGHTS BEEN FURTHERED?

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ABSTRACT

The Queensland *Human Rights Act 2019* was expected to be a replication of the Victorian *Charter of Human Rights and Responsibilities Act* 2006 with a few provisions dealing with local matters. However, the legislation enacted is significantly more complicated. Contained within the Act are attempts to codify case law interpreting the Victorian Charter, attempts to codify international law on human rights that are not in in any comparable Australian legislation and a new system of conciliation of human rights complaints before a conciliation commission that is unique to Queensland. This article examines these attempts at codification and innovation and evaluates whether they are likely to further the observance of human rights more than comparable approaches that have been taken in Victoria and the Australian Capital Territory. It concludes that attempts to codify case law on the Victorian Charter have both furthered and restricted human rights, but that the inclusion of provisions that protect economic and social human rights is likely to further human rights more than comparable Australian legislation. Overall, this article concludes that the innovation of conciliation of human rights *complaints* by the Queensland Human Rights Commission is likely to be determinative of whether it furthers human rights better than comparable legislation in in other jurisdictions.

I INTRODUCTION

Given public statements concerning the new Queensland *Human Rights Act 2019* ('*HRA*') lawyers could be forgiven for expecting that it would be almost entirely a replication of the Victorian *Charter of Human Rights and Responsibilities Act 2006*[1] with a few modifications to account for Queensland conditions.[2] What they have ended up with, however, is significantly more complicated.

While there has been some replication of the Victorian Charter, there also have been attempts to codify, or restate in statutory form, case law that has interpreted it. Some of these attempts at codification are unclear, creating uncertainty. In other cases, rather than codification of the existing Victorian case law it appears that there has been an attempt to override the position in Victoria. While it is unclear why such decisions have been made to codify or change Victorian approaches to different aspects of the

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[1] Hereafter referred to as 'the Victorian Charter'.

[2] See, eg, B Mitchell 'Practising Law under the Human Rights Act 2019' (2019) 25 *James Cook University Law Review* 1, 5.

Victorian Charter the effect has been that the HRA exhibits important differences to the Victorian Charter.

In addition, there are innovations in the HRA that have no counterparts in the Victorian Charter or the *Human Rights Act 2004* (ACT).[3] The question with regard to these innovations, as well as the codifications and changes to the positions in Victorian case law, is the effect they are likely to have on the potential of the HRA to further human rights in Queensland.

This article analyses such codifications and innovations with the aim of critically examining what they do for the protection of human rights under the HRA. It begins by examining those parts of the HRA that clearly seek to codify legal principles that have emerged in Victorian Charter jurisprudence as to their success and what effect they might have on the furthering of human rights. It then examines the attempts to codify some of the principles from international human rights law concerning the rights to education and health. Lastly, it looks at the novel system of conciliation of human rights complaints by the Queensland Human Rights Commission.

II CODIFICATION AND MODIFICATION OF VICTORIAN CASE LAW

A *Section 58(6) HRA*

As expected, the HRA codifies some of the case law that has interpreted the Victorian Charter. By far the least successful attempted codification of this case law, both because of its lack of clarity and because of its possible lack of legal effectiveness, appears to be s 58(6)(a). This provision appears to attempt to transpose into the HRA obiter statements in cases on s 38, the equivalent provision in the Victorian Charter, even though the relevant issue has not been ultimately decided. The lack of clarity in this provision is of concern because s 38 has proven to be one of the most important provisions for furthering public sector adherence to human rights in Victoria.

The first five subsections of s 58 of the HRA, although worded slightly differently to s 38 of the Victorian Charter, appear to be to the same effect. Subsection 6, however, does not appear in s 38 and contains the following Delphic wording.

> To remove any doubt, it is declared that—
>
> (a) an act or decision of a public entity is not invalid merely because, by doing the act or making the decision, the entity contravenes subsection (1)…

Section 58(1) provides:

> It is unlawful for a public entity—
>
> (a) to act or make a decision in a way that is not compatible with human rights; or
>
> (b) in making a decision, to fail to give proper consideration to a human right relevant to the decision.

[3] Referred to as 'the ACT Act'.

The wording of s 58(6)(a) provides no immediate clue as to what it might be referring to. Nor does the Explanatory Memorandum explain its purpose. It is only through an examination of the case law surrounding s 38 of the Victorian Charter that its purpose emerges.

That case law suggests that s 58(6)(a) is an attempt to predetermine the consequences of all findings of unlawfulness under s 58(1). As s 58(6) states that an act or decision of a public body would not be 'invalid' as a result of a finding of unlawfulness under s 58(1), its effect is to state that such an act or a decision would not give rise to a jurisdictional error[4] and thus not be a nullity as a result of such unlawfulness.[5]

Section 38(1) of the Victorian Charter is in almost identical terms to s 58(1) and provides:

> Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.

In Victoria, judicial opinion has yet to come to a concluded view about whether such unlawfulness under s 38(1) amounts to a jurisdictional error that could lead to the act or decision being considered a nullity. The leading authority on the issue is the decision of the Court of Appeal in *Bare v Independent Broad-based Anti-Corruption Commission*.[6] The trial judge in that matter found that unlawfulness under s 38(1) did not amount to a jurisdictional error and did not lead to the invalidity of the decision. On appeal, Warren CJ expressed the view, consistent with that of the trial judge, that a breach of s 38 did not of itself invalidate an exercise of power by a public authority.[7] Tate and Santamaria JJA did not make a finding on the issue. However, Santamaria JA gave extensive obiter reasons why, in his view, conduct is not infected with jurisdictional error for the sole reason that it is unlawful under s 38.[8] The decision in *Bare* thus left this issue without any binding judicial view.[9]

It would appear that the intent of s 58(6)(a) is to determine by legislation that Warren CJ's view in *Bare* in relation to s 38(1) is to be the law in Queensland.

Assuming that there is no effective privative clause, the above would not mean that an applicant would not be able to seek relief. An applicant could in the alternative: (i) seek relief in the nature of certiorari where s 38 unlawfulness appears on the face of the record; (ii) seek injunctive relief to restrain conduct that would be unlawful under s 38;

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[4] *Harvey v Commissioner of State Revenue* [2015] QCA 258 [77]-[79].
[5] Nullity being the general outcome of a finding of jurisdictional error, see *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 614-615 (Gaudron and Gummow JJ).
[6] *Bare v Independent Broad-based Anti-Corruption Commission* (2015) 48 VR 129 ('*Bare*').
[7] Ibid [139].
[8] Ibid [617] ff.
[9] The more recent case of *Certain Children By Their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families & Children (No 2)* [2017] VSC 251 ('*Certain Children (No 2)*') also considered this issue but did not decide it and so left the matter essentially at the same point.

and/or (iii) seek a declaration that conduct was unlawful by reason of s 38.[10] Indeed, in *Certain Children (No 2)* David Dixon J issued prohibitory injunctions to prevent action found to be contrary to s 38. As a result, it would appear that in many situations a person subject to breaches of s 58(1) of the HRA would be able to access other remedies, regardless of whether the decision was a jurisdictional error or not.

However, s 58(6)(a) may not be effective in codifying the views expressed in *Bare*. This is because it may be invalid under the *Constitution* for the reasons stated by the High Court in *Kirk v Industrial Relations Commission of New South Wales.*[11] *Kirk* is generally understood to stand for the proposition that State legislation which would take from a Supreme Court the power to grant prerogative writ relief for jurisdictional error is constitutionally beyond State legislative power.[12] By preventing invalidity of actions due to s 58(1), s 58(6)(a) would prevent such errors being jurisdictional errors and thus prevent the Supreme Court of Queensland issuing prohibition, certiorari and mandamus as remedies to prevent violations of s 58(1) in a way that is arguably beyond the legislative power of the Queensland Parliament.

If this reasoning is correct, and s 58(6)(a) is not effective in achieving its apparent purpose, the position in Queensland and the position in Victoria would both appear to be that the matter is unclear and the issue is still undecided by the courts.

B *Section 48(2) HRA*

Section 48(2) does not have any equivalent in either the Victorian Charter or the ACT Act. In relation to the interpretation of legislation it states:

> If a statutory provision cannot be interpreted in a way that is compatible with human rights, the provision must, to the extent possible that is consistent with its purpose, be interpreted in a way that is most compatible with human rights.

This provision appears to codify aspects of what the Victorian courts have said about interpretation pursuant to s 32 of the Victorian Charter. That view is essentially that s 32(1) applies in the same way as the principle of legality, but with a wider field of application due to the rights in the Charter. As the Victorian Court of Appeal stated in *Slaveski v Smith*:[13]

> Consequently, if the words of the statute are clear, the court must give them that meaning. If the words of the statute are capable of more than one meaning, the court should give them whichever of those meanings best accords with the human rights in question. Exceptionally, a court may depart from grammatical rules to give an unusual or strained meaning to a provision if the grammatical construction would contradict the apparent purpose of the enactment. Even if, however, it is not otherwise possible to ensure that the enjoyment of the human right in question is not defeated or diminished, it is impermissible

[10] E Nekvapil 'Using the Charter in Litigation' in M Groves and C Campbell *Australian Charters of Rights A Decade On* (Federation Press, 2017) 98.
[11] (2010) 239 CLR 531 (*'Kirk'*).
[12] Ibid 581.
[13] *Slavesky v Smith* (2012) 34 VR 206.

> for a court to attribute a meaning to a provision which is inconsistent with both the grammatical meaning and apparent purpose of the enactment.[14]

This was expanded upon by Emerton J in *Taha v Broadmeadows Magistrates' Court* where she stated:

> [c]ompliance with the interpretative obligation in s 32 means exploring all 'possible interpretations of the provision(s) in question and adopting the interpretation which least infringes Charter rights.' [15]

This approach was expressly endorsed by Nettle JA in the Court of Appeal in *Victorian Police Toll Enforcement v Taha.*[16] Although phrased differently, it would appear that s 48(2) HRA embodies and codifies the approach taken in *Taha*.

As s 48(2) appears to codify the liberal position taken in Victoria as to the use of human rights principles in interpreting statutes it has furthered the cause of human rights in Queensland by making that position clearer than it is in Victoria.

C *Section 8 HRA*

Section 8 appears to codify a position that is at odds with obiter comments on the same issue in both Victoria and the ACT.

Section 8 has no equivalent in the Victorian Charter and states:

> An act, decision or statutory provision is compatible with human rights if the act, decision or provision—
>
> (a) does not limit a human right; or
>
> (b) limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with section 13.

This provision needs to be read in conjunction with s 48(1), which states that '[a]ll statutory provisions must, to the extent possible that is consistent with their purpose, be interpreted in a way that is compatible with human rights'.

It appears that s 8 is directed to the question that has previously arisen under the Victorian Charter of whether the limitation formula in s 7(2) is relevant to the interpretative obligation in s 32. The leading authority on this issue is the decision of the High Court in *Momcilovic v The Queen*.[17]

Prior to the High Court's consideration, the Victorian Court of Appeal had held that the question of whether a limitation imposed on a human right by a statutory provision was justified under s 7(2) of the Victorian Charter only became relevant after the meaning of the provision had been established.[18] On appeal to the High Court the justices were

[14] Ibid [24].
[15] *Taha v Broadmeadows Magistrates' Court* [2011] VSC 642 [59] ('*Taha'*).
[16] *Victorian Police Toll Enforcement v Taha* (2013) 49 VR 1 [25].
[17] *Momcilovic v The Queen* (2011) 245 CLR 1 ('*Momcilovic'*).
[18] *R v Momcilovic* (2010) 25 VR 436 [35], [105]-[110].

divided evenly as to whether this position was correct. French CJ, Crennan and Kiefel JJ held that the justification process in s 7(2) cannot inform the interpretive process[19] whereas Gummow J[20], Hayne J[21] and Bell J[22] held that the process in s 7(2) could inform the interpretative process. Heydon J[23] held that s 7(2) could inform the interpretative process, however, this constituted a step to his ultimate conclusion that s 7(2) and s 32(1) were invalid. As a result, there was no majority as to whether the process in s 7(2) should be considered as part of the interpretative process required by s 32.

Subsequent to the High Court's decision in *Momcilovic* the issue arose again in *Noone, (Director of Consumer Affairs Victoria) v Operation Smile (Australia) Inc.*[24] In that matter Nettle JA[25] expressed the view that, given the lack of a majority in the High Court, it was appropriate to adhere to the view of the Court of Appeal in *Momcilovic*. However, Warren CJ and Cavanough AJA found it unnecessary to decide the point. Since then the courts have not further addressed the issue. As a result, the proper approach remains uncertain in Victoria.

Somewhat more clarity appears from considering the interpretative provision under the ACT Act (s 30) and its relation to s 28 of that Act (the equivalent provision to s 7 of the Victorian Charter), as each of these provisions is worded almost identically with its counterpart in the Victorian Charter.

In the pre-*Momcilovic* case of *R v Fearnside*,[26] Besanko J of the ACT Court of Appeal (with whom Gray P and Penfold J agreed) made the obiter comments that the limitations process in s 28 should be considered as part of the interpretative process in s 30.[27] This view was then rejected by Penfold J in the ACT Supreme Court in *In the Matter of an Application for Bail by Islam* [28] where he accepted the view of the Victorian Court of Appeal in *Momcilovic* that justification was to come after the interpretative task in s 30 was complete.

Ultimately, it is the view of Penfold J in *Islam* that has appeared to prevail in the ACT as this same view was adopted more recently in obiter by the ACT Court of Appeal in *Andrews v Thomson*[29] and directly by McWilliam AsJ in *Islam v Director-General of the Department of Justice and Community Safety Directorate.* [30]

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[19] *Momcilovic* (n 17) [24]-[35], [572]-[576].
[20] Ibid [168].
[21] Ibid [280].
[22] Ibid [683]-[684].
[23] Ibid [415]-[427].
[24] *Noone, Director of Consumer Affairs Victoria v Operation Smile (Australia) Inc* (2012) 38 VR 569 ('*Noone'*).
[25] Ibid [142].
[26] (2009) 165 ACTR 22.
[27] Ibid [93]-[98].
[28] *In the Matter of an Application for Bail by Islam* (2010) 4 ACTLR 235 [41] ('*Islam'*).
[29] *Andrews v Thomson* [2018] ACTCA 53 [53] (Elkaim, Loukas-Karlsson JJ and Robinson AJ). Confusingly, the Court of Appeal at [53] attributes that view to the High Court in *Momcilovic*.
[30] *Islam v Director-General of the Department of Justice and Community Safety Directorate* [2018] ACTSC 322 [39]-[40].

Section 8 of the HRA, when read with s 48(1), seems to clarify this position. This is because the definition of 'compatible with human rights' in s 8(b) appears to require, when statutory provisions are interpreted under s 48(1), that the limitations formula in s 13 must be included as part of the interpretive process. Contrary to the uncertain position in Victoria and the somewhat more certain position in the ACT this appears to make the position taken by Gummow, Hayne and Bell JJ in the High Court in *Momcilovic* the statutory position in Queensland.[31]

This construction of the effect of s 8(b) HRA in relation to the interpretive obligation in s 48(1) is confirmed by the Explanatory Notes which state:

> Second, the provision uses the term 'compatible with human rights' which is a defined term for the Bill (see Clause 8). This means that it is clear that the court must apply a proportionality analysis when interpreting a statutory provision under Clause 13. [32]

As a result, the relationship between s 48(1) and s 13 of the HRA appears to be 'similar to that between s 5 and s 6 of the NZ Act'.[33]

What this suggested similarity means is made clear in the judgment of Tipping J in the Supreme Court of New Zealand in *Hansen v R*.[34] His Honour formed a majority with McGrath and Blanchard JJ in finding that s 6 of the *New Zealand Bill of Rights Act 1990* (NZ) was to be applied with reference to s 5 (the limitations provision). His Honour, in the most cited summary of majority approach,[35] summarised the appropriate approach in the following manner:[36]

> Step 1: Ascertain Parliament's intended meaning.
>
> Step 2: Ascertain whether that meaning is apparently inconsistent with a relevant right or freedom.
>
> Step3: If apparent inconsistency is found at Step 2, ascertain whether that inconsistency is nevertheless a justified limit in terms of s 5.
>
> Step 4: If the inconsistency is a justified limit, the apparent inconsistency at step 2 is legitimised and Parliament's intended meaning prevails.
>
> Step 5: If Parliament's intended meaning represents an unjustified limit under s 5, the Court must examine the words in question again, under s 6, to see if it is reasonably possible for a meaning consistent or less inconsistent with the relevant right or freedom to be found in them. If so, that meaning must be adopted.
>
> Step 6: If it is not reasonably possible to find a consistent or less inconsistent meaning, s 4 mandates that Parliament's intended meaning be adopted.'

[31] I am indebted to Saul Holt QC for this point which he raised at a conference on the HRA in Brisbane attended by the author.
[32] Explanatory Notes to the HRA, 31.
[33] *Momcilovic* (n 17) [168] (Gummow J).
[34] *R v Hansen* [2007] 3 NZLR 1 ('Hansen').
[35] A Butler and P Butler, *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis NZ Limited, 2nd ed, 2015) 286.
[36] *Hansen* (n 34) [92] (Tipping J) (Supreme Court of New Zealand).

However, as Tipping J remarked in *Hansen*, this methodology is mostly used in situations where there are two conceptually distinct meanings to a provision. [37] Where there is what he referred to as a 'continuum of meaning' in the statutory provision the New Zealand courts may employ the methodology outlined by the New Zealand Court of Appeal in *Moonen v Film & Literature Board of Review*[38]

That methodology for interpreting an open-ended legislative provision requires a court to:

(1) Determine the scope of the relevant right or freedom.

(2) Determine the different interpretations of the words of the other Act that are properly open. If only one meaning is properly open that meaning must be adopted.

(3) If more than one meaning is available, the next step is to identify the meaning that constitutes the least possible limitation on the right or freedom in question. It is the meaning that s 6 of the Bill of Rights, aided by s 5, required the Court to adopt.

(4) Having adopted the appropriate meaning, identify the extent, if any, to which that meaning limits the relevant right or freedom.

(5) Consider whether the extent of any such limitation as found, can be demonstrably justified in a free and democratic society in terms of s 5. If the limitation cannot be so justified, there is an inconsistency with the Bill of Rights; but, by dint of s 4, the inconsistent statutory provision nevertheless stands and must be given effect.

(6) The Court is to indicate whether the limitation is or is not justified. If justified, no inconsistency with s 5 arises, albeit there is, ex hypothesi, a limitation on the right or freedom concerned. If that limitation is not justified, there is an inconsistency with s 5 and the Court may declare this to be so, albeit bound to give effect to the limitation in terms of s 4.

These approaches, or something very similar to them, appear to be required by s 48(1) of the HRA. In New Zealand the courts have generally approached such questions of interpretation without considering evidence.[39] Given the practicalities of questions of interpretation as opposed to pure questions of limitation this appears likely also to be the present position in Queensland.

Overall, it would appear that the approach to interpretation mandated by ss 8(2) and 48(1) of the HRA is likely to be more restrictive of human rights than the approach adopted in the ACT or that which seems likely to be followed in Victoria. This is because it would be less likely to lead a court to find that a statutory provision cannot

[37] Ibid [94].
[38] [2000] 2 NZLR 9.
[39] A Butler and P Butler (n 35) 179.

be interpreted consistently with a human right and may, therefore, be less likely to lead a court in Queensland to issue a declaration of incompatibility under s 53 of the HRA. Presuming that such a declaration of incompatibility would be likely to lead to the Queensland Parliament and/or Government taking action to enforce the relevant human rights the current position under the HRA seems less beneficial for protection of human rights than in other jurisdictions.

Even if the approach adopted in the ACT, and likely to be followed in Victoria, is rejected in Queensland it would seem undesirable that Queensland be cut off from the development of case law and principle in the ACT and Victoria. As a result, should the case law in the ACT and Victoria adopt a clear view of their interpretative provisions that does not include limitations as part of the interpretive process it may benefit the protection of human rights in Queensland if the relevant provisions were reviewed to consider whether they should be aligned with those in those other jurisdictions.

III SECTIONS 36 AND 37 – CODIFICATION OF INTERNATIONAL NORMS ON ECONOMIC AND SOCIAL RIGHTS

Unusually for human rights Acts around the world, the HRA provides protection for aspects of two economic and social human rights – the right to education and the right to access health services.

Section 36 provides:

> (1) Every child has the right to have access to primary and secondary education appropriate to the child's needs.
>
> (2) Every person has the right to have access, based on the person's abilities, to further vocational education and training that is equally accessible to all.

Section 37 provides:

> (1) Every person has the right to access health services without discrimination.
>
> (2) A person must not be refused emergency medical treatment that is immediately necessary to save the person's life or to prevent serious impairment to the person.

Although unusual, the protection of economic and social rights in legislation similar to the HRA in Australia is not unprecedented. In 2012, the ACT Act was amended to insert a new s 27A, which provides:

> (1) Every child has the right to have access to free school education appropriate to his or her needs.
>
> (2) Everyone has the right to have access to further education and vocational and continuing training.
>
> (3) These rights are limited to the following immediately realisable aspects:
>
> (a) everyone is entitled to enjoy these rights without discrimination;

(b) to ensure the religious and moral education of a child in conformity with the convictions of the child's parent or guardian, the parent or guardian may choose schooling for the child (other than schooling provided by the government) that conforms to the minimum educational standards required under law.

Section 27A was introduced in response to the *Australian Capital Territory Economic, Social & Cultural Rights Project Report* in 2010[40] which recommended that the ACT Act include a range of economic and social rights. In response, however, the ACT enacted protection of only one such right in s 27A and limited that enactment to only its immediately realisable aspects. It also excluded s 27A from the obligations imposed on public authorities in Part 5A of the Act.[41] This restriction was removed in 2015 to allow s 27A to be enforceable against ACT public authorities in the same way as the other rights.[42]

A *Section 36 HRA*

The introduction of the protection of the right to education in the ACT Act went largely unnoticed by commentators. The only judge to consider s 27A at any length has been McWilliam AsJ in *Islam v Director-General of the Department of Justice and Community Safety Directorate*.[43] The Applicant's claim in that matter failed because the issue under s 27A had become moot. There were also other matters that, according to findings on the facts, would have led to the failure of the s 27A claim.[44] However, the Court did not consider the legal principles involved in any depth and so the decision does not provide much guidance as to how such provisions are to be approached.

In Victoria, the courts have stated that the starting point for understanding the rights in the Victorian Charter is a consideration of the statutory language and intent.[45] However, courts in both Victoria and the ACT have noted that the focus should be 'on the purpose of the right and the interest it protects, the legislative intent being that individuals should receive the full benefit of its protection'.[46]

Employing that methodology, it is clear that s 36 HRA only encodes parts of the right to education as it is understood in international human rights law. Firstly, the wording of s 36(1) limits the right of access to primary and secondary education to children. However, it is clear that the words 'appropriate to the child's needs' mean that s 36(1) not only governs access to such education, but may allow a court to make an assessment of its quality or appropriateness. The understanding of what quality or appropriateness might mean in particular circumstances would be guided both by the plain meaning of

[40] Referred to as 'the ACT Report'.
[41] Stated in the second reading speech in relation to the 2012 amendments in the ACT Legislative Assembly, 29 March 2012.
[42] Speech by ACT Attorney-General on 26 March 2015.
[43] *Islam v Director-General of the Department of Justice and Community Safety Directorate* [2018] ACTSC 322.
[44] Ibid [152]-[154].
[45] *Matsoukatidou v Yarra Ranges Council* (2017) 51 VR 624 [76] (Bell J); *Castles v Department of Justice* (2010) 28 VR 141 [71] (Emerton J).
[46] *Antunovic v Dawson* (2010) 30 VR 355. See also *Hakimi v Legal Aid Commission (ACT)* [2009] ACTSC 48 [71].

the words in the statutory context and the understanding of the right in international human rights law as discussed below.

Similarly, it is clear from the wording of s 36(2) that the subsection extends to all persons and not just children and that it includes further vocational education and training but not necessarily all university education (unless, perhaps, it is vocational in nature). The words 'based on a person's abilities' suggest that access to such education could not be denied for other reasons such as a person's ability to pay relevant fees. This would be consistent with the requirement in international law that vocational education and training be made progressively free of charge.[47]

Considering s 36 overall, it is clear that, as in the ACT, the Queensland Parliament has opted to legislate only immediately realisable aspects of the right to education and to make those aspects enforceable in the same way as the civil and political rights protected by the HRA are.

At the international level, the right to education is protected under art 13 of the *International Covenant on Economic, Social and Cultural Rights,*[48] which Australia has ratified. A useful tool for understanding what is encompassed within art 13 of the ICESCR is the so-called '4A' scheme that was set out by the UN Special Rapporteur on the Right to Education, Katerina Tomaševski.[49] Under this scheme the right is said to encompass *Availability*, which means having functioning educational institutions and programmes that are available in sufficient quantities. It is also said to include *Accessibility*, which is said to encompass three key elements of non-discrimination, physical accessibility and economic accessibility. Thirdly, *Acceptability* of education means that the form and substance of education, including curricula and teaching methods have to be relevant, culturally appropriate and of good quality. Lastly, *Adaptability* of education means that it has to be flexible so that it can adapt to the changing needs of societies and communities and respond to the needs of students within their diverse social and cultural settings.[50]

The method by which it is envisaged that art 13 would create legal obligations is set out in art 2(1) of the ICESCR and by General Comment No 3 of the UN Committee on Economic, Social and Cultural Rights. This method is one generally of progressive realisation, with certain immediate obligations such as non-discrimination and minimum core obligations.[51] Unlike in the HRA, this method of progressive realisation of economic and social rights is completely different to the way civil and political rights are enforced at the international level.

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[47] See General Comment 13, paragraph 14 of the UN Committee on Economic and Social Rights.
[48] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('ICESCR').
[49] B Saul, D Kinley and J Mowbray *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (Oxford University Press, 2014) 1096.
[50] Ibid 1099.
[51] Paragraphs 10 to 12 of General Comment No 3.

Viewing s 36 in that context, it would seem that public entities are obliged to make available, under s 36(1), functioning primary and secondary schools to children and, under s 36(2), further vocational education and training institutions to persons such that 'access' can be had to them (to satisfy the 'Availability' criterion). To read s 36 otherwise would make a mockery of the word 'access'. It would also seem be out of kilter with the purpose and substance of the right itself as shown by the above principles for interpreting the ICESCR.

In addition, it is difficult to see how such institutions would be capable of 'access' unless access was non-discriminator and physically and economically accessible (the 'Accessibility' criterion). With regard to s 36(2), the requirement of non-discrimination appears to have been confirmed by the wording of 'equally accessible to all'. As a result of the prohibition of discrimination in s 15(2) of the HRA it is difficult to see why s 36(1) should not be understood in the same way, despite there being no equivalent mention of non-discrimination. Physical access would also seem to be implied in the word 'access' in both ss 36(1) and (2). As mentioned above, economic accessibility appears to be required under s 36(2) by the words 'based on the person's ability'. However, as a matter of principle in relation to s 36(1), such a result may also flow from the word 'access' when considered in the context of the international jurisprudence.[52]

With regard to the 'Acceptability' criterion, it would appear that the words 'appropriate to the child's needs' in s 36(1) incorporate requirements to do with the quality of the curriculum and teaching into that provision. Such a requirement would also appear to be implied into the language of s 36(2) when considered in the context of the international jurisprudence. A corollary to such a requirement in relation to both ss 36(1) and 36(2) would appear to be that children or adults with special needs, such as a disability, would need to be taught according to a curriculum that addressed those special needs.

Lastly, the 'Adaptability' criterion would not appear to be directly incorporated into ss 36(1) or 36(2). However, should the relevant level of education not adapt to changing times or the needs of students to a significant degree it would be doubtful whether it could satisfy the Acceptability criterion in any case.

As mentioned above, the right to education, as an economic and social right, is protected at the international level through the jurisprudence relating to progressive realisation in a way that differs from internationally protected civil and political rights. Section 36 differs from that sharply in according the same obligations to the right to education as with the civil and political rights in the HRA. This is to be commended, as it takes seriously the statement in the *Vienna Declaration and Programme of Action* that all human rights are equal and interdependent[53] in a way that the ICESCR and the UN Committee on Economic and Social Rights have not as yet been able to achieve. It also

[52] A court could consider such jurisprudence pursuant to s 48(3) HRA.
[53] *Vienna Declaration and Programme of Action* (World Conference on Human Rights, 14-25 June 1993) para.5.

sensibly accords to the right to education an ability to be justiciable that has long been advocated for by experts such as the authors of the ACT Report.[54]

This is also to be commended because the experience with the human rights scrutiny regime under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) is that the requirement that there be progressive realisation of social and economic rights to 'the maximum of available resources' under international law has meant that it is difficult to properly evaluate specific pieces of proposed legislation.[55] Progressive realisation tends to require that attention be paid to the overall budgetary situation and interlocking schemes of legislation rather than viewing pieces of legislation in isolation. However, evaluation of whether the rights contained in ss 36 and 37 of the HRA have been breached should not involve such difficulties. As a result, more confined and specific evaluation of compliance by legislation with relevant economic and social rights should be possible in the Queensland system leading to more precise legal conclusions than under the scrutiny system at the Federal level.

A right to education also exists in a range of regional human rights instruments. The most well-known is art 2 of Protocol No 1 to the *European Convention on Human Rights*.[56] Unlike s 36 HRA, art 2 is drafted very broadly and without a focus on immediately realisable obligations.[57] Despite this broad drafting, however, art 2 has been interpreted very narrowly. The most relevant rights to a discussion of s 36 of the HRA contained within art 2 are the right of access to educational establishments that exist[58] and the right to an effective – but not the most effective possible – education.[59]

Given that the wording of art 2 is completely differently to that in s 36 of the HRA it would seem undesirable that the jurisprudence of the European Court of Human Rights be followed and that s 37 be interpreted to only guarantee access to already existing educational institutions. This would seem especially so given that art 13 of the ICESCR explicitly encompasses a wider right and the wording of s 36 does not preclude such an interpretation.

That the European Court has found art 2 to extend to a limited review of the quality of education provided may provide some support for the analysis above that the rights contained in s 36 of the HRA also extend to such an analysis (limited or otherwise) of the quality of such education.

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[54] Such as Hilary Charlesworth and Andrew Byrnes.
[55] Andrew Byrnes 'Economic and Social Rights in the Australian Parliamentary Human Rights Scrutiny Process' in J Debeljak and L Grenfell, *Law Making and Human Rights: Executive and Parliamentary Scrutiny Across Australian Jurisdictions* (Lawbook Co, 2020) 142.
[56] *European Convention on the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 312 UNTS 222 (entered into force 3 September1953).
[57] This right is enforceable under s 6(1) of the *Human Rights Act 1998* (UK): see, for example, *R (Holub) v Secretary of State for the Home Department* [2001] 1 WLR 1359.
[58] *Belgian Linguistics Case (No 2)* [1968] Eur Court HR 3 (European Court of Human Rights). See also the UK House of Lords in *A v Head Teacher and Governor of Lord Grey School* [2006] 2 AC 363.
[59] Lord Lester et al *Human Rights Law and Practice* (LexisNexis, 2009) 671.

B *Section 37 HRA*

Section 37 is entitled the 'right to health services' and not 'the right to health'. The UN Economic and Social Rights Committee in General Comment No 13 makes it very clear that the right to health cannot be reduced simply to a right to medical care and that it encompasses both medicine and wider obligations in relation to public health.[60] That the Queensland Parliament did not intend to legislate for the whole of the right to health as understood in international human rights law is made clear by the Explanatory Memorandum, which states:

> This clause is modelled on article 12 of the ICESCR. This clause provides certain rights in relation to health services and is not intended to encompass rights in relation to underlying determinants of health, such as food and water, social security, housing and environmental factors.

As with the right to education, Queensland has replicated the approach of the ACT in legislating only for certain aspects of the right rather than the whole of the right.

In General Comment No 14, the UN Economic and Social Rights Committee set out 'four interrelated and essential elements of the right to health' that would need to be considered also in relation to s 37.[61] They are (a) Availability; (b) Accessibility; (c) Acceptability; and (d) Quality.

Availability encompasses functioning public health and health care facilities, goods and services, as well as programmes being available in sufficient quantity. *Accessibility* encompasses the elements of (i) non-discrimination; (ii) physical accessibility; (iii) economic accessibility (affordability); and (iv) information accessibility. *Acceptability* means that all health facilities, goods and services must be respectful of medical ethics and respectful of the culture of individuals, minorities and peoples and sensitive to gender and life-cycle requirements. Lastly, *Quality* requires that health facilities, goods and services be medically and scientifically appropriate and of good quality.

Given the very limited degree to which Queensland has legislated in s 37 for the right to health, not all of the above elements would be included within it. As s 37 includes the word 'access' it would appear fairly certain that the Accessibility requirements in General Comment No 14 of non-discrimination (especially given the express mention of this requirement in s 37), physical accessibility, economic accessibility and information accessibility are encompassed. As 'access' would make no logical sense unless there was some facility to access (and given what is said in General Comment 14) it would seem that s 37 would also include to some degree the Availability requirements set out above. Given its limited compass, however, of only including non-discriminatory access and prohibiting denial of emergency medical treatment, the text of s 37 may not encompass the requirements of Acceptability and Quality set out above.

Despite the limited reach of s 37, compared to art 12 of the ICESCR, it is likely that the obligations that it would impose on public entities would extend farther than may be

[60] General Comment No 13, para 46.
[61] Saul, Kinley and Mowbray (n 49) 994.

apparent from the bare words of the provision. An example would be the use made in litigation of s 27(1)(a) of the South African Constitution which provides that 'everyone has the right to have access to (a) health care services, including reproductive health care…'.

In *Minister of Health v Treatment Action Campaign (No 2),*[62] the Constitutional Court of South Africa held that the government's decision to restrict access to a drug designed to prevent mother-child HIV transmission, constituted a breach of s 27(1)(a). If such a situation arose in Queensland of the government limiting access in emergency treatment on a discriminatory basis to a medicinal drug for similar reasons, it would be likely that s 37 would lead to a similar outcome.

To reach its decision in the *TAC* case the South African Constitutional Court employed a broad approach of reasonableness that it deploys in relation to all adjudication on questions of economic and social rights. That approach takes into account available government resources.[63] Any evaluation of the obligations under s 37 (and also, in appropriate circumstances, under s 36) would have to take into account the fact that no such reasonableness approach would be used in relation to the obligations created by s 37. Indeed, under the HRA economic considerations would not normally be sufficient to justify limiting a human right unless they reflected broader societal purposes.[64]

This may mean, paradoxically, that even though the implementation of the human right to health is very limited in s 37 in terms of content, that content would be much more directly enforceable than in South Africa or in the international system. This is because the rights under s 37 (and s 36) would generally be subject to immediate enforcement and not progressive implementation (as under the ICESCR) or some broad reasonableness test (as in South Africa).

IV THE QUEENSLAND HUMAN RIGHTS COMMISSION

Part 4 HRA, deals with, amongst other things, the role of the Queensland Human Rights Commission in conciliating allegations of violations of the rights set out in the HRA. Division 2 of Part 4 concerns how the Commission conciliates complaints made to it. Importantly, the HRA does not allow the Commission to determine any human rights complaint bought before it and it is not a requirement that the complaint be conciliated before the Commission before a matter can be bought before the courts.[65] This institutional arrangement in Queensland is very different to that existing in both the ACT and Victoria.

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[62] [2002] 5 SA 721 (SA Constitutional Court) ('*TAC*').
[63] P de Vos, *South African Constitutional Law in Context* (Oxford University Press, 2014) 708.
[64] In this regard see *Newfoundland (Treasury Board) v NAPE* [2004] 3 SCR 381 [64]-[76] under the Canadian Charter where such a limitation was allowed to prevent the government experiencing severe financial crisis.
[65] In that regard, s 87 HRA states that participation in a conciliation conference does not affect a right the person may have to seek any relief or remedy the person may have for a contravention of s 58(1).

In *Director of Housing v Sudi*,[66] the Victorian Court of Appeal found that the Victorian Civil and Administrative Tribunal did not have jurisdiction to deal with the validity of the Director of Housing's administrative decisions as a collateral issue in property possession proceedings. This was due to its finding that s 39(1) of the Victorian Charter did not operate to confer jurisdiction on the Tribunal to grant relief on a ground of unlawfulness arising because of the Charter.[67]

However, the decision in *Sudi* does not prevent the Charter from being raised at all in such proceedings. In *Sudi* itself Weinberg JA[68] stated that where the question whether a public authority has acted unlawfully is central to the proceedings before the Tribunal or where it is an element of the cause of action in such proceedings,[69] illegality on the part of the public authority could be raised in the Tribunal proceedings. This has since been followed in several cases.[70]

Section 40C(2)(b) of the ACT Act allows a person to rely on their rights under that Act in any legal proceedings. Despite this seemingly much broader provision, the ACT Civil and Administrative Tribunal has come to a very similar conclusion to that reached in Victoria in *Sudi*, although by slightly different reasoning.[71]

The main drawbacks of the positions in Victoria and the ACT have been that disadvantaged people have found it difficult to find sufficient resources to approach the courts to complain of violations of their statutory rights or to find funds to pay any costs orders made against them. In those circumstances, the ability of these tribunals to find that those rights have been violated would have made those rights accessible for a group which arguably suffers the most human rights violations in the community.

Given the above, in the deliberations preceding the enactment of the Queensland HRA representations were made that some agency should have the power to adjudicate on rights violations in a forum that was accessible to disadvantaged people.[72] What was enacted, however, was different to this. Persons alleging violation of their HRA rights can complain to the Commission and it may, provided certain preconditions are met, conduct conciliation of the person's complaint against the relevant public entity. It cannot, however, adjudicate as to whether any HRA right has been violated.

Assessing the implications of this mechanism is complicated by the fact that lawyers generally have a low opinion of bodies or tribunals which do not have a power of

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[66] *Director of Housing v Sudi* (2011) 33 VR 559 ('*Sudi*').
[67] Ibid [48] (Warren CJ), [98] (Maxwell P), [265]-[282] (Weinberg JA).
[68] Ibid [150]-[153].
[69] Neither of these was the case in *Sudi*.
[70] *Goode v Common Equity Housing Ltd* [2014] VSC 585; *Slattery v Manningham City Council* [2013] VCAT 1869; *Caripis v Victoria Police* [2012] VCAT 1472 [99]-[100]; *McAdam v Victoria University* [2010] VCAT 1429 [58].
[71] *Commissioner for Social Housing (ACT) v Massey* [2013] ACAT 41 ('*Massey*'); *Commissioner for Social Housing (ACT) v A* [2015] ACAT 13 [31]-[43]. Essentially, this reasoning is that if the Legislature had intended that ACAT be provided with a human rights jurisdiction under s 40C(2)(b) it would have explicitly said so; see *Massey* [44].
[72] See, for example, the submission of the Queensland Law Society on the HRA dated 22 April 2016 where it suggests adjudication of complaints under the HRA by the Queensland Civil and Administrative Tribunal, at [48].

adjudication. This is even though such bodies (such as the Ombudsman) can be very effective in changing administrative practices in individual cases[73] and in negotiating individual outcomes and remedies beneficial to complainants. Such effectiveness, however, usually depends on very specific contextual factors such as the stature of the agency, its experience, resourcing and ability to work with administrative officials.[74]

Given these very specific and contextual requirements and that the system of conciliation under the HRA is still in its early days, despite 88 complaints being accepted in the last financial year,[75] it is hard to evaluate how well this arrangement might ultimately work. If there is respect for the Queensland Human Rights Commission, its experience, its connections to other public entities, and its goal of further human rights observance, the system of conciliation may prove a success in having the human rights of disadvantaged people in Queensland addressed in an accessible forum. However, should there be resistance by public entities to the Commission's conciliation capacity then the system could prove ineffective in protecting human rights.

Unlike under the ACT Act, where there is a freestanding cause of action in courts,[76] under the HRA[77] it is only possible to complain to the courts of the breach of any HRA right if a person already has a cause of action, other than through a breach of the terms of the HRA.[78] This means that in Queensland it would appear (at least in terms of legal doctrine) that it is harder to access the courts to complain of a breach of human rights than in the ACT.

If the provisions of the HRA allowing for conciliation of complaints before the Commission do not protect human rights in the way envisaged, because there is no freestanding cause of action in the courts, the detrimental consequences in Queensland for observance of the provisions of the HRA could be significant.

V CONCLUSION

The HRA must be seen to be a mixed bag compared to the ACT Act and the Victorian Charter in terms of whether it better furthers human rights. The attempts to codify Victorian Charter case law might be seen to have, on occasion, furthered human rights and sometimes restricted it and not to have been always been as successful as intended. The inclusion of the rights to education and health services in the HRA though do appear to have furthered human rights.

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[73] Matthew Groves, 'Ombudsman's Jurisdiction in Prisons' (2002) 28 *Monash University Law Review* 181, 201ff.
[74] Ibid 202.
[75] Queensland Human Rights Commission Annual Report 2019-20, 40.
[76] *Human Rights Act 2004* (ACT) s 40C.
[77] Section 59 HRA.
[78] This is the same as in Victoria under s 39 of the *Charter of Human Rights and Responsibilities Act 2006*.

Overall, whether the HRA furthers human rights better than other Australian equivalent statutes (at least in terms of independent adjudication of complaints rather than the drafting of legislation or action by Parliament) appears to hinge on the success of the system of conciliation of complaints by the newly established Commission. The success of that system depends on very specific factors that cannot be predicted. Should that system not prove successful, however, the fact that the HRA does not contain a freestanding right of action to complain of breaches by public authorities before Queensland courts, unlike under the ACT Act, may mean that it might not ultimately prove more successful than the Victorian Charter in protecting human rights and might perhaps prove less successful in that regard than the ACT Act.